

## A Great Mind?

Miers might vote right, but what the Court truly needs is intellectual leadership.

BY TODD J. ZYWICKI

Conservatives, who greeted John Roberts Jr.'s nomination to the Supreme Court with approval but muted enthusiasm, have responded to the nomination of Harriet Miers with a full-throated roar of protest. *The Weekly Standard's* William Kristol summarized the feeling: "I'm disappointed, depressed and demoralized."

The bitter complaint, which I share, is that Miers' nomination amounts to a squandered opportunity, one that is heightened by the fact that it follows on the heels of the Roberts appointment.

Miers' defenders on the right, many with stalwart conservative credentials and who know Miers well, have generally responded that she will be a reliable vote with the conservative bloc on the Supreme Court.

Why, then, are these assurances insufficient to assuage conservative concerns, and why is there such a widespread perception that the nomination of Miers amounts to a squandered opportunity?

### CHANGE THE CULTURE

There are two possible ways to think about Supreme Court appointments. One is to appoint those who will simply "vote right" on the Court; the other is to be more far-reaching and to try to change the legal culture.

Justices such as Oliver Wendell Holmes Jr., Louis Brandeis, Earl Warren, and William Brennan Jr. all changed both the Court and the legal culture, by providing intellectual heft and credibility to a certain view of the law. Justices Clarence Thomas and Antonin Scalia have been trying to do the same thing for some time now, both inside and outside the Court. The late Chief Justice William Rehnquist, by contrast, may have changed the voting patterns of the Court, but he did not change the underlying legal culture through intellectual leadership.

President George W. Bush's nomination of Miers is a clear indication that his goal is merely to change the voting pattern of the Court. One suspects that the best that conservatives can hope is that Miers will consistently "vote right."

Miers attended a perfectly fine law school (Southern Methodist University), but in a place and time in which it is unlikely that she would have encountered the types of issues that confront the Court today. Since then, she has had a distinguished legal career, but from all appearances, one in which she would have rarely had the opportunity or inclination to think seriously about the Court or its role in American society.

In private practice, Miers proved herself most distinguished as an administrator and managing partner at the various iterations of her law firm in Texas—useful skills, certainly, but different from those needed by a Supreme Court justice. Her own practice appears to have focused on the routine issues of commercial litigation.

Finally, her primary responsibility during her time working in Washington has been as a staff secretary and deputy chief of staff, again doing primarily management and administrative duties, not intellectual heavy-lifting.

There is simply nothing in her background or temperament to suggest that she is likely to push or pull or otherwise lead the Court in ways that will move the legal culture. There is nothing in her career to suggest that she has ever thought or needed to think in any meaningful manner about larger questions of law, the Constitution, or judicial philosophy.

### ON-THE-JOB TRAINING

Because of her lack of judicial experience at any level, Miers will need substantial on-the-job training. Unlike a lawyer who has regularly argued before the Supreme Court, she may not have even that familiarity with Court cases and issues to draw upon. It certainly is possible for a 60-year-old to start what amounts to a completely new career and learn a completely new set of skills for the first time, but it is a challenge for even the most gifted person.

At the very least, Miers faces a substantial learning curve. It will be several years—a period of thinking through issues and listening to the arguments—before she herself has anything meaningful to say. It is really difficult to imagine that Miers will ever be in a posi-

tion to exercise any substantial intellectual leadership within, much less outside of, the Court.

### TEMPTED LEFT

Even worse, the historical record suggests that justices who are appointed on the presumption that they will “vote right” but who lack a developed judicial philosophy soon don’t even vote right. Those who come to the Court without a clear judicial philosophy almost always end up moving left over time. Think Harry Blackmun, David Souter, etc.

Supreme Court justices face great pressure and tempting opportunity to try to solve every conceivable social and political problem. There are few external constraints on the Court’s power; thus, resisting such blandishments requires an unusually strong internal commitment to the proper role of the judiciary in our constitutional system. The siren’s song toward liberal activism may be even greater for conservative women and minorities on the Court, who still face the patronizing double standard and expectations of elite opinion to bring their unique demographic “perspectives” to the Court, rather than simply applying a principled jurisprudence.

Moreover, the issues that will confront the Court five or 15 years from now are likely to be far different from the debates that preoccupy the Court now. Simply because a justice can be relied upon to get the answers right today does not provide any assurance that that same person will be a reliable vote on wholly different issues in the years to come. For a judge to remain true to a particular legal vision over time, she must have that vision before arriving at the Court.

### STILL INSIDE THE BOX

The perception that Miers represents a missed opportunity is heightened because it directly follows Roberts’ appointment as chief justice.

Although his brilliant performance before the Senate has assuaged much of the early conservative angst about his unknown views, Roberts’ judicial philosophy does not promise much intellectual leadership, either. He seems to embrace an incremental, rather than systemic, approach. Indeed, his confirmation by the Senate was predicated on his explicit disavowal of any overarching judicial philosophy. He has no obvious ties to the conservative legal movement, and the White House went out of its way to deny allegations of his membership in the Federalist Society.

One suspects that Roberts’ opinions will likely be models of the judicial craft—thoughtful, careful, and probably, in most instances, pleasing to conservatives. But they also will likely be exemplars of inside-the-box judicial thinking, without the bold intellectual force and envelope-pushing that is necessary to change the legal culture. Conservatives can find much in Roberts to admire and take comfort from, but little to excite.

Thus, neither Roberts nor Miers seems suited to provide the kind of leadership that will move the larger legal culture—Roberts by temperament and Miers by background.

These two appointments thus support a common criticism of this president—that he is uninterested, even disdainful, of ideas and interested only in power. Roberts and Miers may both turn out to be perfectly fine justices, and Roberts surely will prove influential inside the Court itself. But the choice of two stealth candidates with no obvious overarching judicial philosophy suggests an administration narrowly obsessed with winning minor tactical victories (here, an easy confirmation) while consistently failing to follow through with meaningful, long-term strategic ones (such as an opportunity to change the legal culture).

With a Republican in the White House, 55 Republicans in the Senate, and two open seats on the Supreme Court, this moment in history presented an opportunity to not only transform the Court but to complete a revolution in the legal culture that has been a generation in the making.

Inspired by thinkers such as Scalia, Thomas, Robert Bork, and Richard Posner, and nurtured by groups such as the Federalist Society and the Institute for Justice, the conservative legal movement in America has grown in confidence and competence, building a deep farm team of superbly qualified and talented circuit judges primed for this moment.

The prevailing liberalism of the contemporary legal culture was on the ropes and primed for a knockout—only to have the president let it get off the canvas and survive this round.

### WORTH THE FIGHT

On the other hand, some commentators have argued that those (such as myself) who hoped for a well-known intellectual conservative should be grateful that their views did not carry the day inside the White House. Harold Meyerson, writing in *The Washington Post* on Oct. 5, observes, “[J]ust because the conservative intellectuals are itching for a fight over first principles doesn’t mean their country is. . . . Most of the right wing’s legal agenda commands minority support in the country and provokes majority opposition.”

I disagree. Conservatives should not fear to debate their judicial philosophy. It defers to the judgment of elected officials at the state and national levels, preserves federalism and the separation of powers, and empowers individuals to use their property free from arbitrary regulation. On numerous issues—such as public religious displays, property rights, and the death penalty—it is far more popular than the liberal alternative.

That’s why so many conservatives are upset with the president. Picking someone who merely votes right while forgoing the chance to change the larger legal culture is a squandered opportunity. Even worse, when the president picks someone who votes right but who follows no overarching judicial philosophy, he may soon find himself with a justice who does neither.

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